

(2)
No. 90-623

Supreme Court, U.S.

FILED

NOV 2 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

DARRELL S. CLASPILL,

Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSOURI!

GERALD D. MORRIS
Missouri Pacific Railroad
Company
2801 Rockcreek Parkway
North Kansas City, MO 64117
(816) 245-2887

*Counsel of Record
for Respondent*

JAY M. NADLMAN
Missouri Pacific Railroad
Company
2801 Rockcreek Parkway
North Kansas City, MO 64117
(816) 245-2891

LIST OF PARENT AND SUBSIDIARY COMPANIES

PARENT

Union Pacific Corporation

ASSOCIATE

Union Pacific Railroad Company

SUBSIDIARY

The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge &
Terminal Company

The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Chicago and Western Indiana Railroad
Company

Houston Belt & Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Terminal Industrial Land Company

TABLE OF CONTENTS

	Page
LIST OF PARENT AND SUBSIDIARY COMPANIES	i
TABLE OF AUTHORITIES	iii
PERCEIVED MISSTATEMENTS OF FACT	1
ARGUMENTS AGAINST GRANTING THE WRIT ..	1
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
UNITED STATES SUPREME COURT CASES:	
<i>Adams v. State of Maryland</i> , 347 U.S. 179 (1953).....	3
<i>Bradley v. School Board of Richmond</i> , 416 U.S. 696, 711 (1974).....	3
<i>Hallowell v. Commons</i> , 239 U.S. 506 (1916)	3
<i>State of South Carolina v. Baker</i> , 485 U.S. 505 (1988)	3
<i>United States v. Security Industrial Bank</i> , 459 U.S. 70 (1982)	3
 CIRCUIT COURT CASE:	
<i>United States v. Vanella</i> , 619 F.2d 384, 386 (5th Cir. 1980).....	3
 STATE SUPREME COURT CASE:	
<i>Martinolich v. Southern Pac. Transp. Co.</i> , 421 So. 2d 435 (La. App. 1988), cert. denied 109 S. Ct. 3164 (1989)	3
 FEDERAL STATUTES:	
23 U.S.C. §409.....	2, 3, 4
45 U.S.C. §51	2

PERCEIVED MISSTATEMENTS OF FACT

Petitioner in his Petition for Writ of Certiorari asserts that exhibit 108 reproduced in Appendix E of the Petition for Writ Certiorari, contains "the state's specific advice to respondents of the need for upgraded crossing protection." Petition, p. 6. In fact, exhibit 108 was nothing more than a crossing survey conducted by the Missouri Public Service Commission for the purpose of obtaining federal funding for improvement of highway and railroad grade crossings in the State of Missouri. Rather than being advice to respondent, the exhibit merely indicated the nature of improvement under consideration, which was "Flashing Light Signals at Std. Location." The sole purpose for creating exhibits 107 and 108 was to obtain federal funding for improvements. Subsequent to the generation of exhibits 107 and 108, the railroad crossing at First Street in Adrian, Missouri was removed from the prioritization list and no signals have been installed at this crossing.

ARGUMENTS AGAINST GRANTING THE WRIT

The decision of the Supreme Court of Missouri should not be reviewed as it presents neither an important question of federal law, nor does the opinion conflict with the opinions of the United States Supreme Court. A review of the relevant case law demonstrates that no issue is presented to this Court which would justify the exercise of this Court's discretion to grant the Writ of Certiorari.

The only issue on appeal was whether 23 U.S.C. §409 should be applied by a court to exclude evidence in a trial held after its effective date. The evidence in question, as reproduced in Appendix E of the Petition for Writ of Certiorari, was created by the State of Missouri prior to the effective date of 23 U.S.C. §409, but suit was filed and the information discovered after the effective date of 23 U.S.C. §409 (effective April 2, 1987). The trial court and the Missouri Supreme Court both held that 23 U.S.C. §409 was a procedural statute governing the admissibility of evidence at trial, and that it should properly be applied to exclude evidence at a trial commencing after its effective date.

(a) No Important Question of Federal Law.

The statute in question regulates the admissibility of a limited class of documents at trial. Although petitioner's claim was brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, 23 U.S.C. §409 has no special connection or nexus with the FELA. No questions interpreting the FELA were preserved for appeal. The fact that a Federal Employers' Liability Act claim was involved was merely coincidental and not central to the interpretation or application of 23 U.S.C. §409. As the alleged failure to petitioner to make a submissible case under the Federal Employers' Liability Act was not relied upon by the Missouri Supreme Court in its decision, the burden of proof necessary to sustain a claim for mental or emotional injuries without accompanying physical injuries is not properly before the United States Supreme Court.

Petitioner's claim that imposition of a federal evidentiary rule in State Court violates the tenth amendment does not raise an important federal question. The Court has clearly defined the scope of tenth amendment protection in *State of South Carolina v. Baker*, 485 U.S. 505 (1988). The power of the federal government to regulate in this area so long as it serves a recognized constitutional purpose has been long established. *Adams v. State of Maryland*, 347 U.S. 179 (1953).

(b) The Decision of the Missouri Supreme Court is Consistent with the Decisions of this Court.

The decision of the Missouri Supreme Court is in accord with the only other appellate court to consider the application of 23 U.S.C. §409. See *Martinolich v. Southern Pac. Transp. Co.*, 421 So. 2d 435 (La. App. 1988), cert. denied 109 S. Ct. 3164 (1989). Both decisions were based on the principle enunciated in *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974), that in the absence of legislative mandate to the contrary or unless such application would cause manifest injustice, a court is to apply the law in effect at the time it renders its decision.

23 U.S.C. §409 modifies the rules of evidence, and is procedural in nature. It is well established that statutory changes which are procedural or remedial in nature should be applied to cases tried after the statute's enactment. *Hallowell v. Commons*, 239 U.S. 506 (1916); *United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980). Petitioner relies on *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), but he fails to realize or acknowledge

that the statute at issue in that case affected antecedent rights.

It would be unworkable to apply 23 U.S.C. §409 in any way other than to each case coming to trial after its enactment. The application to pending cases is not retrospective, as the statute is only applied to cases tried after its enactment. It would create an absurd rule of evidence to forever grandfather into admissibility evidence created prior to the enactment of 23 U.S.C. §409, but to exclude documents created after its enactment. In this case, petitioner would be allowed to prove that the crossing was on the priority list, but respondent would be prohibited from proving that it was subsequently removed from the priority list. Rather than having clear and uniform rules of evidence to apply, the trial court in each instance would be forced to hold a factual hearing and take evidence concerning when the documents sought to be excluded were created. For this reason, in the absence of legislative history to the contrary, statutes of procedure and evidence are applied to all cases tried after their enactment.

CONCLUSION

As no substantial question of federal law exists and the unanimous decision of the Missouri Supreme Court is not in conflict with the decisions of this Court, the petition for Writ of Certiorari should be denied.

GERALD D. MORRIS
Missouri Pacific Railroad
Company
2801 Rockcreek Parkway
North Kansas City, MO 64117
(816) 245-2887

Counsel of Record for Respondent

JAY M. NADLMAN
Missouri Pacific Railroad
Company
2801 Rockcreek Parkway
North Kansas City, MO 64117
(816) 245-2891